IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PATRICIA ACOSTA, et al.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION NO.: 1:04CV01618
	)	
v.	)	Judge James Robertson
	)	
INTELSAT GLOBAL SERVICE CORP. et al.,	)	
	)	
	)	
Defendants.	)	

PLAINTIFF'S SECOND SURREPLY MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs, by their counsel, respectfully submits this second surreply memorandum of points and authorities in opposition to Defendants' motion to dismiss the Complaint in this action for failure to state a claim pursuant to Rule 12(b)(6) and Rule 9(b) of the Federal Rules of Civil Procedure.

Plaintiffs wish to direct the Claimant's attention to relevant caselaw on the issue of what constitutes an ERISA plan, which was raised in Defendant's reply brief. The United States Court of Appeal for the District of Columbia, in Kenney v. Roland Parson Contracting Corp., 28 F.3d 1254 (DC Cir. 1994), reversed the dismissal of a complaint for ERISA benefits. As in the case with Intelsat, the employer in Kenney told its employees it established an ERISA plan, issued a document summarizing the plan, but the employer had not in fact established the plan. The Court of Appeals nevertheless found an ERISA plan had been established.

The Kenney Court started its analysis by noting that a plan need not be formalized. Quoting the Eleventh Count, the Court noted that the question is whether a reasonable person

could from the surrounding circumstances determine the intended beneficiaries, benefits, procedures, and financing:

> As the statute itself makes clear, however, the plan need not be formalized; the plaintiff can prevail if the existence of a plan can be inferred from the "surrounding circumstances." 29 U.S.C. § 1002(2)(A); *see also, e.g., Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982) (en banc) (holding that although ERISA requires administrator to maintain written instrument establishing plan, such instrument is "not [a] prerequisite[ ] to coverage under the Act").
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> * * *
>
> [A] court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits. Some essentials of a plan, fund, or program can be adopted, explicitly or implicitly, from sources outside the plan, fund, or program . . . but no single act in itself necessarily constitutes the establishment of the plan, fund, or program.

Id. at 1257 (emphasis added).

The Court relied upon the Third Circuit seven factor test, and found a plan existed because five of the factors were met:

> As the Third Circuit recently described the appropriate inquiry:
>
> > [1] internal or distributed documents, [2] oral representations, [3] existence of a fund or account to pay benefits, [4] actual payment of benefits, [5] a deliberate failure to correct known perceptions of a plan's existence, [6] the reasonable understanding of employees, and [7] the intentions of the putative sponsor would all be relevant to determine whether a plan existed.
>
> *Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, 974 F.2d 391, 400 (3d Cir. 1992).
>
> By our reckoning, in this case at least five of the seven factors - all but numbers [3] and [4] - weigh in favor of the employer having established an ERISA plan.

* * *

> We must be mindful also of the Congress's intention to protect employees from the possibility of abused inherent in the operation of an employee pension or other benefit plan, *see* 29 U.S.C. § 1001(a). In view of the purpose of the statute, it seems to us that an employer's representation that a plan has been established, in conjunction with any action, such as withholding wages for contribution to such a plan, that tends to confirm its representations, will ordinarily outweigh the employer's failure formally to establish a plan. *Dillingham* test are as one-sided as they are in this case, a court should find that a plan has been established in order to effectuate the "broadly protective purposes" of ERISA. *John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings Bank,* ____ U.S. ____, ____, 114 S.Ct. 517, 524, 126 L.Ed.2d 524 (1993).

Id. at 1258-1259 (emphasis added).

Other courts have likewise found that it makes no sense to allow an employer to escape ERISA liability by its own failure to follow ERISA's procedural requirements:

> Although ERISA contains numerous requirements that a plan must adhere to–a written instrument, named fiduciaries, public reports, etc., *see id.* §§ 1021-1031, 1101-1114–these requirements are not part of the definition of "plan."
>
> Failure to meet these requirements does not exempt Gulf from coverage by ERISA. Such failure merely indicates a failure by Gulf to comply with ERISA. Were such failure to exempt Gulf from coverage by ERISA, employers could escape ERISA's coverage merely by failing to comply with its requirements.

Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503 (9th Cir. 1985) (emphasis added).

This is, of course, a fact specific issue and thus not ripe for summary judgment. Moreover, the Board's Resolution and draft plan attach to it, as well as Intelsat's post-privatization representation, meet all 7 factors in Henglein.

CONCLUSION

Defendants' motion to dismiss should be denied.

Respectfully submitted,

PLAINTIFFS

By _____

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DATED: January 26, 2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of January, 2005, the foregoing Second Surreply Memorandum in Support of Defendants' Motion to Dismiss was electronically filed and served by first class mail on:

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